



11-1-1939

# Natural Law and the Law-Making Function in American Jurisprudence

Brendan F. Brown

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

## Recommended Citation

Brendan F. Brown, *Natural Law and the Law-Making Function in American Jurisprudence*, 15 Notre Dame L. Rev. 9 (1939).

Available at: <http://scholarship.law.nd.edu/ndlr/vol15/iss1/3>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

## NATURAL LAW AND THE LAW-MAKING FUNCTION IN AMERICAN JURISPRUDENCE

The category "natural law," in juxtaposition with the thought-classification "human law," was created by Greek philosophical genius and refined by Thomas Aquinas, after an intermediate Roman transition in the form of *jus naturale*. Greek philosophers reasoned by analogy from the cosmic order, with its constantly recurring and universal phenomena of physical nature, to an idealized social regime actualized by law. Right and justice were based upon the harmony or fitness involved in the nature of things. These notions were universally valid. They were not a matter of human will.

The classical Roman jurists maintained the ethical homogeneity of the category but utilized it not only in the sense of a speculative body of universal ideals and principles arising from the nature of things, but also as a norm with which to criticize the positive law, and as the basis of jural development and law-making. This *jus naturale* was an objective pattern unaffected by what individual men might think concerning its existence or content. It was distinguishable from the *jus gentium* which was positive law.

Thomas Aquinas subdivided the category *jus naturale* into the *lex aeterna* or the reason of the divine wisdom governing the whole universe, and the *lex naturalis* or the law of human nature which proceeded ultimately from God but immediately from human reason in which it was mirrored. This latter law governed the actions of men only. Mankind ought to obey the *lex naturalis*. The rest of creation was under compulsion to follow the *lex aeterna*.<sup>1</sup> Aquinas described these two sub-categories as *lex* because he conceived the *jus naturale* as the enactment of a personal Supreme Law Giver, Creator of the Universe. Mankind must not thwart this enactment.

---

<sup>1</sup> AQUINAS, *SUMMA THEOLOGICA*, (Dominican trans., 1915), 1, 2, 91-94.

The notion of natural law in politics, ethics and jurisprudence is inescapable. The wisdom of Greek psychic intuitionism which had penetrated the divine plan was verified pragmatically later in the laboratory of human relations. The concept of natural law set in motion slowly evolving juridical and political rationalizations which periodically proved crucial in deciding the direction of many great group-movements throughout history. The notion of such a law has dominated the zone of jurisprudence. It has been badly mutilated by certain quasi-thinkers, but those who have endeavored to banish the concept completely have failed. In the words of Prof. Benjamin Wright:<sup>2</sup>

"Unless we are willing to contend that the concept of a law that ought to be is an inadmissible one, the basis of natural law remains untouched."

It is true that in the United States a maximum heterogeneity<sup>3</sup> has been communicated to the classification "natural law." Only its normative implication has been universally retained. Whether the gauge be the "natural law" of standards and received ideals, advocated by Professor Pound<sup>4</sup> and the sociological school of jurisprudence, as the ideal picture of the end of law, or whether it be the normative element in the juridical faiths of the late Mr. Justice Cardozo,<sup>5</sup> Dean Landis,<sup>6</sup> Professor Simpson<sup>7</sup> or Professor Llewellyn,<sup>8</sup> or the *lex naturalis* of Professor Adler<sup>9</sup> and the scholastic jurists, or the "natural law" of behaviorism or psychological yearning

---

<sup>2</sup> WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW (1931) 323. Note his reference to Morris Cohen's article on *Jus naturale redivivum*, 25 PHILOSOPHICAL REV. 761 (1916).

<sup>3</sup> *Ibid.* 333-338. There Wright has given a detailed description of eight different meanings which natural law has had in American jurisprudence and politics.

<sup>4</sup> POUND, LAW AND MORALS (1926) 113 ff.

<sup>5</sup> See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1925) 162 ff.

<sup>6</sup> Landis, *The Implications of Modern Legislation to Law Teaching*, 7 AM. L. REV. 157 (1935).

<sup>7</sup> Simpson, *The Function of the University Law School*, 49 HARV. L. REV. 1068 (1936).

<sup>8</sup> Llewellyn, *Some Realism about Realism*, 44 HARV. L. REV. 1222 (1931).

<sup>9</sup> MICHAEL AND ADLER, CRIME, LAW AND SOCIAL SCIENCE (1933).

of Jerome Frank<sup>10</sup> and Thurman Arnold,<sup>11</sup> there is an evident unanimous agreement upon the requirement of an extra-legal criterion—the constitutive of an apparatus allowing a process of intelligent change in the juristic regime.

Though the notion of natural law has been variously anathematized, it has served a very useful purpose in the history of American law. Regardless of the many disadvantageous consequences which have resulted from deficient or erroneous interpretations of the natural law in the United States, it has been particularly helpful in the creation and improvement of both public and private law. This was inevitable. Roscoe Pound has stated, that in every period of the growth of law, "it has been liberalized by ideas of natural right or justice or reasonableness or utility, leading to criteria by which rules and principles and standards might be tested."<sup>12</sup> Although a doctrine of natural law was not much needed in American *political* theory after the Civil War,<sup>13</sup> it was highly important thereafter in the building up of American Constitutional law.<sup>14</sup> The importance of natural law in this respect is thus described by Professor Haines:

"The process by which certain ideas involved in the law of nature were judicially declared within the language of the fundamental law constitutes an important step in the evolution of the legal concept in the United States. It is this principle which renders natural law such an important principle in modern constitutional law."<sup>15</sup>

Ethical principles under the name of natural law received constitutional sanction in the due process clause,<sup>16</sup> the fifth<sup>17</sup> and fourteenth<sup>18</sup> amendments, and the requirement of equal

---

<sup>10</sup> FRANK, *LAW AND THE MODERN MIND* (1930).

<sup>11</sup> ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935); *THE FOLKLORE OF CAPITALISM* (1937).

<sup>12</sup> POUND, *THE SPIRIT OF THE COMMON LAW* (1921) 84.

<sup>13</sup> WRIGHT, *op. cit. supra* note 2 at 327 ff.

<sup>14</sup> *Ibid.*, 330 ff.

<sup>15</sup> Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 *Yale L. Jour.* 636 (1916).

<sup>16</sup> HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (1930) 347 ff.

<sup>17</sup> See *Twining v. N. J.*, 211 U. S. 78 (1908).

<sup>18</sup> See *Howard v. Kentucky*, 200 U. S. 164, 173 (1906); *Holden v. Hardy*, 169 U. S. 366, 389 (1897); *Hurtado v. California*, 110 U. S. 516, 536 (1883).

protection of the laws.<sup>19</sup> This happened although judges were often inclined to use a synonym for natural law such as "reason" or the "nature of the thing" and the like. Instances of this are to be found in the decisions of Marshall,<sup>20</sup> Chase,<sup>21</sup> Kent <sup>22</sup> and others.

In the field of private law, the concept of natural law made possible the growth of equity jurisdiction and the gradual amelioration of the common law, both substantively and adjectively.<sup>23</sup> It justified the fiction of the "reasonable man" which played such a large part in the law of torts. It was the groundwork of the law of quasi-contract, conflict of laws, trusts, wills, mortgages and the like, however camouflaged the natural law factor might have been in specific adjudications.<sup>24</sup>

But in spite of the vast benefits which the philosophy of natural law has conferred upon the American legal system, it was employed paradoxically at times as an instrument of economic oppression and social injustice. This result has flowed from misconceptions of the structure and function of natural law as understood by those who centuries before had conceived the category. Four erroneous deviations from this original notion of natural law may be observed in the history of American law.

In the first place, certain judges and legislators in the formative period of American law at times identified natural law with positive law, i. e., the moral order with the legal. Bills of Rights and constitutional amendments were treated simply as declarations of natural liberty which was identical

---

<sup>19</sup> See *Giozza v. Tiernan*, 148 U. S. 657, 662 (1892).

<sup>20</sup> See Marshall's views in *Fletcher v. Peck*, 6 Cranch 87, 135 (1810). There he stated that it might well be doubted whether the nature of society and of government does not prescribe some limit to the legislative power.

<sup>21</sup> Thus note Chase's opinion in *Calder v. Bull*, 3 Dallas 386, 388 (1798) that a positive law made by the legislature in contravention of the first principles of the social compact would not be rightful.

<sup>22</sup> See *Dash v. Kleeck*, 7 Johns. (N. Y.) 477, 505 (1811).

<sup>23</sup> Haines, *op. cit. supra* note 15 at 651.

<sup>24</sup> *Ibid*, 617.

with common law liberty. Constitutions declared common law principles which were at the same time natural law generalizations. This fallacy had been fostered by Coke and was so deeply imbedded in American politics and jurisprudence that when the American colonists decided in 1776 to throw off the political yoke of England, they approved a Declaration of Independence which asserted a *congeries* of inalienable natural rights which were equivalent to their common law rights which they had set forth in the Continental Congress two years earlier.

What was the result of this confusion of law and morals? The law-makers often idealized the established legal precepts which were regarded as fundamental, immutable and eternal. These rules were not capable of progression toward an extrinsic ethical goal. Many legislators tended to believe that the legislative process was primarily a matter of sustaining a specific legal order rather than of endeavoring to make that order conform, as far as practically possible, to an outside moral ideal. In some nineteenth century decisions, it was held that the judicial process must prevent the alteration of the common law categories of contractual ability by legislation.<sup>25</sup> The theory was that since the common law was the same as natural law and since this latter existed prior to the State and hence was superior to the will of the State, the legislature must not fundamentally change the Common law.<sup>26</sup>

But obviously the concept of a positive law which was identical with natural law was incompatible with the homogeneity of the Thomistic-Aristotelian category. The ultimate notion of *jus naturale* was the denial of an ideal system of human positive law, springing from reason and existing eternal, immutable, and equally applicable to all times and places. The *raison d'être* of Greek natural law thinking was

---

<sup>25</sup> See *State v. Fire Creek Coal and Coke Co.*, 33 W. Va. 188 (1889).

<sup>26</sup> See *Comm. v. Perry*, 155 Mass. 117 (1891); *Leep v. Ry. Co.*, 58 Ark. 407 (1894); *State v. Loomis*, 115 Mo. 307 (1893).

the subjection of the legal order. But this necessarily implied the existence of these two orders as distinct entities.

Secondly, the natural law was sometimes viewed as a specification of moral rights, which supported legal rights without any corresponding legal duties. Since the natural law, under this interpretation, did not prescribe duties, these moral rights were absolute.<sup>27</sup> The same was true of legal rights. The sole purpose of the positive law, therefore, was to protect and maintain the rights of individuals against other individuals and the state. This juristic theory of rights, whether regarded as moral qualities, inherent in human beings and deducible from the abstract, isolated, individual man, after the doctrine of Grotius, or based upon a social contract, such as that postulated by Rousseau, was individualistic. Whether the basis of these moral qualities was voluntaristic, or non-voluntaristic, they must be given effect by the common law regardless of social consequences. One school of American natural law jurists followed the Coke dogma which identified natural law with the common law, and the other, the doctrine of the French-Dutch publicists, but each was concerned with rights rather than duties.

As a consequence of this second false interpretation of natural law, judges began to speak of the absolute rights of property, freedom of contract,<sup>28</sup> exemption from taxation, and the like. Natural law thus became a weapon against social progress and legal reform. Beneficial labor legislation was invalidated in the name of natural law. Social facts were ignored in the judicial process. Is it surprising that this "led a number of writers who are primarily interested in social reform and in constitutional law to adopt (an) . . . unfriendly attitude toward natural law"<sup>29</sup> in general?

---

<sup>27</sup> Brown, *The Bar and the Democratic Process*, 13 TEMPLE L. QUART. 287-295 (1939).

<sup>28</sup> See Pound, *Liberty of Contract*, 18 YALE L. JOUR. 454 (1909); *Adair v. U. S.* 208 U. S. 161, 175 (1907); *Coppage v. Kansas*, 236 U. S. 1 (1914).

<sup>29</sup> WRIGHT, *op. cit. supra* note 2 at 316.

But here again, there was a radical deviation from the content of the *jus naturale* which was evidently not only for the benefit of the individual but also of society, because its original Greek rationale perceived a law which was essentially for the purpose of holding together and aiding cosmos. This in turn was beneficial to the individual units which went into the construction of cosmos. But the secret of the law which made possible cosmos was referable to an equilibrium between the whole and its parts and between the constitutive parts. By analogy, in the field of human society (the human cosmos), such a theory must demand a balancing of rights and duties, the conceptual and the actual, unity and plurality, and stability and motion.

Thirdly, some American jurists and judges were of the opinion that the basis of natural law was subjective rather than objective. From this point of view, natural law was what the individual judge thought it was. It was the reflection of his own personal wishes, sense of justice or intuitive feeling. It was determinable by introspection alone. There was no authority in the form of history, custom, sociology, economics, or the rational sciences to which this intuitive determination of the content of the natural law was subject.

This theory of natural law which refused to recognize any authoritative objective basis could be and frequently was a tool of social injustice. It might be arbitrarily employed by a judge either to uphold a specific precept of law or to overrule it. It afforded judges an opportunity of injecting their own personal sociological and economic predilections into the judicial function. It enabled them to exploit the law for the protection of class interests. It gave the critics of natural law jurisprudence occasion to say that such law was but an empty symbol, a trap for the unwary and a subterfuge for unscrupulous manipulators of the law.

How did such a notion of natural law compare with the classical model of the *jus naturale*? The Greek metaphysical



substructure of the *jus naturale* was referable to the observational data of matter, mechanics, and motion fixed in a set pattern. There was general agreement as to the fundamental contour of this objective physical mold. Denial of this pattern did not affect the fact of its existence. The moral order analogously existed as a metaphysical fact despite denial by human intelligences. Besides existence, therefore, this order had definite and specific form, independently of the will of any human individual. Its shape was not ascertainable by abstract reasoning. The rational process must be proceeded by an inquiry into the fact-content of sense-perceptions.

According to classical conceptions, no judge could ignore extrinsic *subsidia* in his endeavor to know the meaning of natural law or to apply it in concrete adjudications. Judges might vary to some extent in their conception of this norm, just as physical scientists differed as to the measurements of matter, but the justice of juridical decisions depended upon adherence to this outer authority, however much the individual judge sought to interpose his own mind. Of course a judge would not be morally culpable, if he in good faith followed a misinformed conscience.

Fourthly, there were American jurists who did not derive from their natural law jurisprudence a comprehension of the teleological character of law. Means and end were telescoped by those who merged the legal and moral orders. Positive law had no function to perform except to maintain itself. Justice was to be measured in terms of the maintenance of the existing legal regime rather than by its conformity to an ideal moral order. Some courts reasoned *in vacuo*. Judicial premises were sometimes a little more than meaningless clichés which led to conclusions out of joint with life and experience.

But the regrettable evils which followed in the wake of this deficient legal doctrine are well known since their exposure by the sociological and realist schools of jurisprudence. The

jurisprudence of conceptions which had sometimes been given moral aid by the sanction of quasi-natural law was a logical outgrowth of a static positive law. A law which ceased to grow could not be used as a means to achieve contemporary social objectives.

A reasonable interpretation of the implicit tenets of the original conception of natural law would have revealed the essential factor of purposefulness. The rediscovery of the teleological aspect of law by Ehrlich and Jhering, culminating in the modern "engineering" or "architectural" notions of jurisprudence, has been followed by the restoration of an important element to the body of jurisprudence. This element had been removed through the quackery of pseudo-natural law jurists and representatives of the historical and analytical schools. The renaissance of juridical dynamism is tantamount to a reaffirmation of the wisdom of the *jus naturale*. Could the idea of law as a means to an end be more clearly revealed than by the thought that law was for the purpose of ordering the cosmos of society and that law was to actualize the divine plan for men living in society?

Truly it would be a fascinating study to endeavor to ascertain why so many nineteenth century and early twentieth century legalists insisted upon interpretations of natural law which, it is now generally conceded, retarded much desirable social legislation, why they assisted in transmitting erroneous notions which brought all natural law thinking into disrepute, and why they thus delayed the entrance of the American State into its proper sphere as a reconstructor of the social order for the improvement of the general temporal welfare. Were they ignorant of the history of the philosophy of natural law? Or did a mistaken idealism make them disdainful of the partially pragmatic character of the earliest form of natural law, which reckoned with facts as well as principles, results as well as causes, and the centripetal and centrifugal social forces which unite in the equilibrium of basic group units?

But despite all the deleterious influences which the philosophy of natural law has exerted in the areas of American law and politics, can it be said to have been of less value, in the light of the many good results which have accrued from the impingement of this particular form of philosophical jurisprudence upon American civilization, than other eighteenth and nineteenth century theories? Surely natural law jurisprudence did serve as a principle of legal growth and improvement by and large in the United States. It was characterized neither by the sterility of the analytical methodology, nor the antiquarianism of the historical.

From this survey of the part played by the natural law concept in American jurisprudence, it is manifest that all the attacks which have been levelled against this juridical conviction ignored the Aristotelian-Thomistic type and were concentrated on counterfeit brands of natural law. This should afford a clue as to the best future direction of natural law thinking. Obviously the category of natural law should be stripped of its erroneous content, a new name employed if possible to describe it, and an exhaustive effort made to explore the maximum potentialities of natural law as a medium of political and juridical reform and advancement.

Legists should explain more adequately the meaning of natural law and its multitudinous functions. Perhaps this will necessitate the growth of a large group of jurists in this country who are sympathetic toward the restoration of the philosophy of natural law to its rightful place in the world of jurisprudence. But whatever the cost in terms of effort, contemporary civilization will be amply repaid. Indeed if natural law thinking continues in its present muddled state, so that it will play no decisive role in determining the future direction of the world hegemony of ideas, man will have betrayed his faculties.

Apparently the task of rescuing the legal philosophy of natural law from its present deplorable state will be accom-

plished, if ever, only by the work of scholastic legists. Fortunately there has been a rather recent revival of scholastic or theophilosophical jurisprudence in both Europe and the United States. This has perhaps been most pronounced in France. There the work of Francois Geny, Professor in the Catholic University of Nancy, has been outstanding. His greatest work, *Science et technique en droit privé positif*,<sup>30</sup> sensing as it does the significance of the transitions through which the notion of natural law has passed in reference to the domain of positive law, and perceiving that emphasis must now be placed upon "social life as a moral phenomenon,"<sup>31</sup> as well as upon the individual as a moral entity who ought to obey the natural law as stressed by Thomas Aquinas, has actually demarcated the sphere which should be investigated by modern proponents of neo-scholastic jurisprudence. The amplification of content produced by applying reasonably implicit tenets of Greek-inspired Thomism to the new facts created by changes in social structure since the days of ancient Greek and the medievalism of the thirteenth century is revealed in the work of Geny. Insofar as Geny has marked out "a neo-scholastic theory subjecting social life, that is, the life of the individual man as a moral entity in society as a moral phenomenon, to the scrutiny of reason in order to discover certain precepts which may be used to establish norms (i. e., patterns or models) for law-making, law-finding, and the application of law,"<sup>32</sup> he has furnished jurists who are concerned with the institutions and legal figures of the Anglo-American legal system with a great quarry of materials from which much inspiration may be drawn. An inkling of Geny's concept of natural law may be had from the statement that "if natural law is called upon to circumscribe the activities of man, it must never forget that man presents him-

---

<sup>30</sup> In four volumes, I (1913), II (1915), III (1921), IV (1924).

<sup>31</sup> Pound, *Fifty Years of Jurisprudence*, 51 HARV. L. REV. 464 (1938).

<sup>32</sup> GENY, 2 *SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF* (1915) 9-11.

self less as an individual than as a member of society, which puts him in continuous contact and relation with his fellows." <sup>33</sup>

Likewise in the United States, there has been a revival of theophilosophical jurisprudence, although as yet an American Geny has not emerged. This has taken the shape of important written contributions, speaking the language which has been endorsed by contemporary American jurisprudence, yet restating the ancient truths in terms of their impact upon modern law. Outstanding in these productions are the writings of Robert Maynard Hutchins <sup>34</sup> and Professor Mortimer Adler <sup>35</sup> of the University of Chicago, who have shown the deficiencies in types of American legal education, futilely presuming that inert facts will arrange themselves; of Professor Walter Kennedy of Fordham University who has bombed the citadel of juridical pseudo-realism <sup>36</sup> from the stratosphere of scholastic natural law; and of Dean James Thomas Connor <sup>37</sup> of Loyola University in New Orleans who is beginning to test the soundness of certain American legal institutions from the viewpoint of scholastic doctrine. In 1936, the American Catholic Philosophical Association was persuaded to inaugurate an annual round table on the philosophy of law, which has borne fruit in the production of six papers <sup>38</sup> to date on various phases of scholastic jurisprudence. Dr. Miriam Theresa Rooney, a leader in

---

<sup>33</sup> *Ibid* 18.

<sup>34</sup> See Hutchins, *Legal Education*, 4 U. CHI. L. REV. 357 (1937).

<sup>35</sup> See Adler, *Legal Certainty*, 31 COL. L. REV. 91 (1931).

<sup>36</sup> For example in such articles as *Principles or Facts*, 4 FORDHAM L. REV. 53 (1935).

<sup>37</sup> Thus see Connor, *The Law of Succession*, 8 FORDHAM L. REV. 151-165 (1939).

<sup>38</sup> Lilly and Curran, *The Possibilities of a Neo-Scholastic Philosophy of Law in the United States*, 12 PROCEEDINGS OF THE AMERICAN CATHOLIC PHILOSOPHICAL ASSOCIATION 111-117 (1936); Kennedy and Russell, *Current Attacks Upon and Suggested Methods of Preserving a Neo-Scholastic Jurisprudence*, 13 *IBID.* 186-201 (1937); Farrell and Connor, *The Derivation of Political Authority*, 14 *IBID.* 103-121 (1938). The American Catholic Philosophical Association has begun its series of philosophical studies with the publication of Rev. Dr. William F. Obering's S.J., study in comparative jurisprudence entitled *THE PHILOSOPHY OF LAW OF JAMES WILSON, 1789-1798*.

that organization, has demonstrated the philosophical limitations of material pragmatism in contemporary jurisprudence.<sup>38</sup> Prior to the renaissance of this jurisprudence in the United States such pioneers as Father Holaind<sup>39</sup> of Georgetown University and Dean Robinson<sup>40</sup> of the Catholic University of America at the turn of the last century and Father LeBuffe<sup>41</sup> of Fordham in more recent times had transmitted the essential ideals to which scholastic jurisprudence should aspire. So great was this renaissance that the new Aristotelian scholasticism has been ranked in authoritative circles<sup>42</sup> as one of the three most dominant schools of jurisprudence in the United States.

But this revival of natural law jurisprudence in the philosophical sense will be short lived unless it is reinforced by the active support of the faculties of Church law schools.<sup>43</sup> The undertaking of making understandable the full meaning of the category of scholastic natural law in the every day workshop of the Common lawyer and judge is no easy matter, particularly because there is no important experience upon which to proceed. Because of historical accident, scholastic philosophy had no opportunity to walk hand in hand with the Common law<sup>44</sup> as it had relative to the Roman and Canon laws in the great medieval universities after the revival of learning at Bologna in the twelfth century. A comparable educational process will be possible only if legal

---

<sup>38</sup> See Rooney, *Pluralism and the Law*, 13 THE NEW SCHOLASTICISM 301-335 (1939); Rooney, *LAWLESSNESS, LAW, AND SANCTION* (1937).

<sup>39</sup> HOLAIND, *NATURAL LAW AND LEGAL PRACTICE* (1899) 51.

<sup>40</sup> ROBINSON, *ELEMENTS OF AMERICAN JURISPRUDENCE* (1900).

<sup>41</sup> LEBUFFE, *OUTLINES OF PURE JURISPRUDENCE* (1924); LEBUFFE AND HAYES, *JURISPRUDENCE* (1938).

<sup>42</sup> For example in the 1937-1938 Jurisprudence Seminar in the Harvard Law School. See Pound, *Fifty Years of Jurisprudence*, 50 HARV. L. REV. 464 ff (1938).

<sup>43</sup> BROWN, *Jurisprudential Aims of Church Law Schools in the United States—A Survey*, 13 NOTRE DAME LAWY. 163 (1938).

<sup>44</sup> BROWN, *Catholic Education and Law*, in VITAL PROBLEMS OF CATHOLIC EDUCATION IN THE UNITED STATES (1939—Ed. by Deferrari) 218-231, the lecture was delivered August 6, 1939, before the Summer School of the Catholic University of America, as part of the Golden Jubilee program of the University.

educators endeavor to gain a better knowledge of natural law and make it the starting point in their every day pedagogy.

In the clarification of the scholastic meaning of natural law, its plastic applicability must be emphasized. Adherents of the scholastic school of jurisprudence may disagree among themselves as to the wisdom of a specific adjudication or a particular legislative enactment, although they are agreed as to the moral generalization which is the starting point. They may agree as to the ultimate ethical postulate, but disagree as to sub-ultimates. They may be of different opinions as to the existence of certain facts or as to their relative weights. In such instances their juridical conclusions would be different. The content of the aggregate of the legal rules produced casuistically in the judicial, administrative, and legislative processes, respectively, by applying the *jus naturale* to facts, legal or extra-legal, must necessarily vary as often as these facts undergo substantial change.

But at the same time, future studies as to the significance of scholastic natural law, as applied to positive law, should bring out with equal clarity the existence of the static opposite in the form of fixed ultimates, contrasted with the dynamic terminal. The ethical sub-ultimates of the sociological and realist schools of jurisprudence, which are apparently moving toward nowhere and causing the proponents of these schools to fall into the error of confusing means with end, against which they have so successfully contended in reference to competing brands of jural thinking, can be given ultimate direction and their teleological value determined in specific instances. Twentieth century "scholastic realism" may integrate the prevalent juridical techniques by supplying an adequately comprehensive teleological idealism. Just as positive law should be a means to a moral end, so also should a sub-ultimate ideal be a means to a final ethical end.

There is need of haste in making available a well-worked out exposition of the classical conception of natural law for

law-makers, enabling them to invoke an authority strong enough to preserve the best in the American legal tradition and to discard the worst. The sweeping condemnation of the natural law basis of most of our public law, with the innuendo that every type of law jurisprudence is passé, must ultimately lead to the repudiation of our traditional political order itself, because it was the natural law concept which molded and gave contour to the American State. If the authority of every form of natural law jurisprudence can be overthrown, first in law, and thereafter in the political field, it is very easy to understand how easily a bloodless revolution could take place with respect to the American State, which might be made in the future to rely on the physical sanction of force, or the will of majorities.

But since every form of natural law jurisprudence except that of the *jus naturale* is highly vulnerable to intellectual onslaught because of fundamental weaknesses, the only hope of continuing the American natural law tradition, over and above its present widespread and inescapable usage as a normative critique for the positive law, is by recourse to the plastic scholastic model. Not only will this pattern afford law-makers ideals, but it will provide an authority which will endow our basic social institutions with relative stability. The retention of the category of *jus naturale* in the judicial process will have the psychological value of insuring continuity in our traditional jurisprudence which by way of parallelism will aid the continuity of our political and social orders. This continuity should tend to insure their substantial continuance in the future.

The chaotic stage through which the whole world seems to be passing at the present time, largely as a result of rejecting natural law philosophy in international relations, the complete breakdown of the natural law mode of thought as the basis of international law, the rejection of the natural law category, either in theory or in fact or in both in the totalitar-



ian countries,—in short the elimination of natural law philosophy from both the international and national orders, with results which are obviously disastrous to the happiness of man and frustrative of his final spiritual end, must be apparent to all American jurists. The lesson learned from this should be utilized now—the lesson that the annihilation of the *jus naturale*, the denial of a divine plan, the rejection of the example of a cosmos unified by supra-human law, the isolation of human society from the context of the universe, and the attribution of divine finality to human law and divine perfection to human will, must place men on a purely animal or physical plane, wherein the savagery of the jungle will be imitated with consummate astuteness.

In the light of reason and experience, the best assurance of the continuation of the sociological factor in law which has been the object of greatest attention on the part of jurists who have been the severest critics of natural law jurisprudence is the survival of the doctrine of the *jus naturale*. If sociological jurisprudence is grounded merely upon an emotional humanitarianism, the arising of class conflicts in the domestic arena and of national and racial encounters in the amphitheater of war would tend to paralyze its inner energizing nucleus, because the animalistic aspects of mankind would be starkly revealed. But if the duty of legists to improve law as an instrument of human happiness is grounded upon a supra-human mandate, then the obligation remains whatever man may do to prove himself unworthy of juridical consideration.

In conclusion, therefore, the concept of natural law is more essential for the proper operation of the judicial and law-making processes than ever before. Many legislators and judges have become convinced that all natural law jurisprudence is an obstacle to legal improvement and right political growth because in the past theories of natural law were used to oppose social and economic betterment. Positive and natural law were made identical, judges talked of absolute

legal rights, they resorted to their own economic convictions under the guise of natural law in the decision of cases. The idea that law was to be purposive was rejected. Now it must be demonstrated that all these evils were the result of natural law theories which were not consonant with the classical doctrine of the *jus naturale*. The great value of natural law jurisprudence when used in its genuine sense in the origin and evolution of the American legal and political systems must be reiterated.

The logical custodians of a scholasticized category of natural law and of its accompanying jurisprudence are the faculties of Church law schools. They are chiefly responsible for the future of such jurisprudence which has enjoyed a considerable revival in recent years. Devotion to this cause will not only serve the ends of truth, but will contribute to the wide-spread socialization of the law by supplying a definitive authority—the absence of which is perhaps the greatest weakness in the sociological and realist movements. A strong scholastic cult of law will be a source of strength to all those who are convinced of the wisdom of perpetuating the reign of natural law, both at home and abroad, and perceive, in the growing anarchy of the world order, the triumph of a socio-economic ethical philosophy gaining ascendancy to the extent that men withdraw their allegiance from the Author of the *jus naturale*.

*Brendan F. Brown.*

School of Law, Catholic University of America.